

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

Agenda ID 13471
RESOLUTION E-4695
December 18, 2014

REDACTED
R E S O L U T I O N

Resolution E-4695. Southern California Edison's submission for approval of four Aggregator Managed Portfolio Demand Response contracts for 2015-2016 bridge years.

PROPOSED OUTCOME:

- Approve the contracts for EnerNOC, Inc., and Energy Connect, Inc.; reject the contracts for Constellation Newenergy, Inc., and North American Power Partners.

SAFETY CONSIDERATIONS:

- Demand Response generally can have health and safety implications in that it helps support local and system reliability and grid needs.
- The potential loss of Demand Response due to the rejection of the two contracts is unknown because participants on those contracts could conceivably enroll in other SCE Demand Response programs or contracts.

ESTIMATED COST:

- None. The funding for these contracts was previously approved in D.14-05-025.

By Advice Letter 3078-E filed on July 15, 2014.

SUMMARY

This Resolution approves two revised demand response contracts for Southern California Edison's (SCE) Aggregator Managed Portfolio (AMP) Program in Advice Letter (AL) 3078-E. SCE filed AL 3078-E in compliance with Commission Decision D.14-05-025. Specifically, this Resolution approves SCE's contracts with EnerNOC, Inc. (EnerNOC) and Energy Connect, Inc. (ECI) but rejects SCE's

contracts with Constellation Newenergy, Inc. (Constellation) and North America Power Partners (NAPP).

BACKGROUND

On September 7, 2012, SCE filed Application A.12-09-007 for Expedited Approval of Five Demand Response (DR) Resource Purchase Agreements. The Application was filed in compliance with D.12-04-024, Ordering Paragraph (OP) 16, which directed SCE to renegotiate the terms of the contracts approved in D.09-08-027, or to conduct a competitive solicitation for new contracts. SCE chose to conduct a competitive solicitation and on January 29, 2013, the Commission issued D.13-01-024 adopting the five DR contracts and authorizing a two-year budget of \$49.3 million for SCE's DR AMP program for 2013-14.

On May 19, 2014, the Commission issued D.14-05-025 approving bridge funding for SCE's DR programs for 2015-16, which included up to \$49.3 million for SCE's AMP agreements¹. This decision also directed SCE to continue good faith negotiations with its AMP program contractors to extend the agreements through 2016 and to consider the changes approved by the Commission for Pacific Gas and Electric Company's (PG&E) demand response contracts in D.14-02-033 as well as changes recommended by the Office of Ratepayer Advocates (ORA)². SCE renegotiated contracts with four of the five current AMP contractors for the 2015-16 bridge period, and filed AL 3078-E seeking approval of these renegotiated agreements. SCE renegotiated contracts with 4 of its 5 AMP contractors: EnerNOC, ECI, Constellation, and NAPP. Energy Curtailment Specialists, the fifth contractor, withdrew from negotiations and has indicated that it will let its existing contract expire at the end of 2014.³

¹ D.14-05-025, OP 19.

² D.14-05-025, OP 18.

³ SCE AL 3078-E, page 2.

NOTICE

Notice of AL 3078-E was made by publication in the Commission's Daily Calendar. SCE states that a copy of the Advice Letter was mailed and distributed in accordance with Section 4 of General Order 96-B.

PROTESTS

SCE's AL 3078-E was originally filed on July 15, 2014 and was timely protested by the Office of Ratepayer Advocates (ORA) on August 4, 2014.

SCE responded to ORA's protest on August 11, 2014.

ORA filed a supplemental Response to AL 3078-E on September 17, 2014, which Energy Division (ED) accepted as a Late-Filed Protest on September 19, 2014.

EnerNOC, Inc. (EnerNOC), Johnson Controls, Inc. (JCI, parent company of ECI), and Comverge, Inc. (Comverge), all filed a Joint Objection to Energy Division Consideration of ORA's late-filed Protest on September 25, 2014. SCE also filed a response to ORA's late-filed protest on September 26, 2014.

The following is a more detailed summary of the major issues raised in the protests.

DISCUSSION

Energy Division (ED) has reviewed SCE AL 3078-E, ORA's protest, SCE's response to ORA's protest, ORA's late-filed protest, the Joint Objection and SCE's response to ORA's late-filed protest. This resolution is divided into three sections:

- 1) A review of the process issues raised by SCE and in EnerNOC, JCI, and Comverge's Joint Objection to ED's consideration of ORA's late-filed Protest.
- 2) The determination of whether SCE met the AMP contract renegotiation criteria set forth in D.14-05-025.
- 3) The determination of whether ORA's concerns, above and beyond what was ordered in D.14-05-025, have merit.

The main criteria that the Commission used to determine which contracts should be approved and which should be rejected are the criteria set forth in D.14-05-025, which are summarized in Section 2 below. A discussion of ORA's additional concerns, those raised in its initial Protest and its late-filed Protest, is included as Section 3 in order to address whether ORA's recommendations have merit and whether they should be raised in future DR proceedings involving new AMP contracts.

First, we address the procedural concerns raised in the Joint Objection filed by EnerNOC, JCI, and Converge.

1. Review of process issues raised by SCE and by EnerNOC, JCI, and Converge

In its September 26, 2014, Reply to ORA's late-filed Protest, SCE highlights that it considers ORA's filing to be "procedurally inappropriate" in that it violates General Order (GO) 96-B⁴. Specifically, SCE cites Section 7.4.3 of GO 96-B, which states that, "The protestant may not reply to the utility's reply" and that the only situation that would warrant a supplemental protest would be if SCE had filed a supplement to its advice letter⁵. SCE did not file a supplement to this advice letter, and thus asked ED to reject ORA's late-filed protest. SCE still provided a response to ORA's late-filed Protest, though, in the event that ED did choose to consider ORA's late filing.

In their September 25, 2014, Joint Objection to ED's "consideration" of ORA's late-filed Protest, EnerNOC, JCI, and Converge contend that ED had no authority to re-label ORA's "Supplemental Protest" as a "late-filed Protest" in order to permit its consideration. Further, they state that ED's action to consider ORA's late filing violates Commission rules of practice and procedure and wrongly allows a "collateral attack" on a final decision and ruling in R.13-09-011.

The Joint Objection goes on to highlight that ORA's filing and its permission for a reply limited to SCE creates additional legal and due process violation by failing to consider that:

⁴ SCE Reply to ORA's late-filed Protest, September 26, 2014, pp. 1-2.

⁵ GO 96-B, General Rules, Section 7.4.3.

- a) Party challenges or requested changes to final Commission decisions must be undertaken by application for rehearing or petition for modification.
- b) Collateral attacks or re-litigation of final Commission decisions or ruling should not be allowed, especially in the context of an informal advice letter process.
- c) The Commission should take steps to reject unsupported claims.

None of the parties' procedural objections has merit. General Order 96-B, Rule 7.4.4 allows a late-filed protest or response as long as the affected utility has a chance to respond:

7.4.4 Late-Filed Protest or Response

The reviewing Industry Division may consider a late-filed protest or response. If an Industry Division considers a late-filed protest or response, it will so notify the utility, and the utility shall have five business days from the date of issuance of the notice within which to reply to the late-filed protest or response.

Here, SCE responded substantively to ORA's late filing, as did the parties to the Joint Objection. The fact that Energy Division deemed ORA's filing to be a "late filing" is entirely within Energy Division's discretion. Further, the Joint Objection recognizes that allowing ORA's late-filed protest is not contrary to any law⁶. Thus, it is appropriate for Energy Division to allow ORA's late-filed protest to be considered, the main points of which we discuss below.

2. Did SCE meet the AMP contract renegotiation criteria set forth in D.14-05-025?

D.14-05-025, OP 18, provided guidance for SCE on how to proceed with its AMP contracts for the 2015-16 bridge funding period. Specifically, it ordered SCE to continue to negotiate in good faith with its AMP contractors to extend their agreements through December 31, 2016. It also encouraged SCE and its AMP contractors to consider improvements already made in PG&E's AMP agreements, which were approved by the Commission in D.14-02-033. SCE was

⁶ Joint Objection of EnerNOC, JCI, and Comverge, September 25, 2014, p.1.

also encouraged to consider the changes recommended by ORA in its March 3, 2014 comments on proposals for revisions to DR programs for the 2015-16 bridge funding years. Those recommendations were:

- i. Seller-directed tests should be discontinued, and test events should be called with the same duration as provided for dispatch events⁷.
- ii. Capacity payments should be based on actual capacity provided during an event, and not just the best performing hour⁸.
- iii. Notification times for test and dispatch events should be shortened from one hour to thirty minutes⁹.

Lastly, OP 18 encouraged SCE and its contractors to work collaboratively with each other and ORA in order to revise the agreements¹⁰.

We find that SCE complied with the Commission's directives in D.14-05-025 for two of the four contracts that it proposes in AL 3078-E. SCE's proposed agreements with EnerNOC and ECI are generally consistent with the Commission's directive to consider the improvements made to PG&E's AMP agreements and ORA's recommendations made in the proceeding, meaning they contain certain terms and conditions that are similar to those found in PG&E's AMP agreements and reflect ORA's recommendations. The Commission did not set the expectation that SCE's contracts must be the same as PG&E's AMP agreements or include all of the recommendations made by ORA. Instead, the Commission allowed SCE and its contractors a certain degree of flexibility in their negotiations by encouraging them to consider the PG&E contracts and ORA's recommendations. It was our intention that some semblance or likeness to the terms and conditions found in PG&E's contracts and to ORA's recommendations be demonstrated in SCE's proposed contracts. We conclude

⁷ R.13-09-011, ORA Opening Comments on Proposals for Revisions to DR Programs for Bridge Years, March 3, 2014, p.3.

⁸ R.13-09-011, ORA Opening Comments on Proposals for Revisions to DR Programs for Bridge Years, March 3, 2014, p.4.

⁹ R.13-09-011, ORA Opening Comments on Proposals for Revisions to DR Programs for Bridge Years, March 3, 2014, p.5.

¹⁰ D.14-05-025, OP 18.

that the EnerNOC and ECI contracts have demonstrated the semblance we were seeking and are therefore compliant with the Commission's previous orders and should be approved.

However, we also find that SCE's proposed contracts with Constellation and NAPP are not compliant with our directives in D.14-05-025. Specifically these contracts do not carry any semblance to the terms or conditions found in PG&E's contracts nor do they contain any of ORA's recommendations. We do not see enough improvement to these contracts to warrant their approval and therefore the proposed Constellation and NAPP contracts should be rejected. SCE may re-engage negotiations with these demand response providers with the goal of creating new agreements with some semblance to PG&E's contracts and ORA's recommendations. If successful, SCE may submit a new advice letter with the revised contracts. We recognize that a re-submittal of revised contracts for Constellation and NAPP would occur after January 1, 2015, our deadline for changes to the existing portfolio. We will make an exception to that deadline recognizing that our expectations for the AMP contracts established in D.14-01-004 have been clarified in this resolution.

Confidential Appendix A contains a staff analysis of the specific terms and conditions of all four contracts compared against PG&E's AMP program and ORA's recommendations.

3. Do ORA's concerns raised in its protests have merit?

A. Concerns from ORA's August 4, 2014 protest

In its August 4, 2014, protest, ORA lists three main contentions with SCE AL 3078-E:

- 1) The AL should be suspended so it can be considered in conjunction with the Phase 3 Settlement to R.13-09-011 (which, at the time, of filing was still being negotiated).
- 2) SCE should provide proposed DR contracts that show 2013-14 performance in order to determine whether it is necessary to extend these contracts.
- 3) Determining the reasonability of the 2015-16 proposed commitment levels is dependent on 2013-14 contract performance.

SCE responded that ORA's first contention is out of scope as the Commission did not order SCE to consider Phase 3 Settlement issues as part of its negotiations. We agree with SCE that the AL should not be considered in conjunction with the Settlement as that was not required by the Commission previously.

With regard to ORA's second and third contentions, SCE responded that ORA's request for performance data and commitment levels is inappropriate. SCE states that past performance of the contracts or their commitment levels at the time of the protest is not indicative of what performance will be in 2015 and 2016. SCE states the risks to SCE's ratepayers is mitigated by the structure of the contracts which pay based on performance. SCE also explains that it already provided ORA with 2013 performance data at a meeting on July 2, 2014, and did not provide the entirety of 2014's data simply because it was not yet available.

ORA's concerns about past performance of the contracts and MW commitment levels are important considerations, but are inappropriate for this advice letter venue. In Phase 1 of R.13-09-011, we made the determination that SCE's AMP program should be extended for 2015-16 and approved the funding necessary for the contracts¹¹. As discussed earlier, our expectation of SCE was to negotiate the new contracts so that they have some semblance with PG&E's existing AMP program and ORA's specific recommendations provided in the proceeding. We did not require SCE to demonstrate the overall reasonableness of the contracts in terms of their past performance or their current commitment levels through its advice letter filing. Therefore, ORA's August 4, 2014 protest is rejected. We do note, though, that SCE should be monitoring and evaluating the performance of its 2015-16 AMP contracts, as such information will be important to the Commission in determining the extent to which similar contracts should be approved in the future.

B. Concerns from ORA's September 17, 2014, late-filed Protest.

In its September 17, 2014, late-filed Protest, ORA offered specific recommendations on the terms of AMP contracts for the 2015-16 bridge years.

¹¹ D.14-05-025, p. 40.

While we appreciate ORA's careful analysis of the proposed contracts, it should be noted that in D.14-01-004, the Commission clearly stated that any changes to demand response programs proposed in this Rulemaking (including AMP contracts) should be implementable by January 1, 2015¹². Due to the protracted nature of this advice letter filing, all of ORA's requests would not be implementable by the January 1, 2015, deadline¹³. The importance of the January 1, 2015 deadline is a non-trivial matter. The underlying objective of the Commission was to provide a sense of continuity for existing demand response programs, including the AMP program, for the bridge years. Hence program improvements were purposely kept narrow by the Commission and had to be implemented before the start of the bridge year. Hence, we decline to implement ORA's specific recommendations for the AMP contracts, but address them nonetheless, as they do raise important considerations for potential future demand response contracts.

In its September 17, 2014, late-filed Protest, ORA put forward four discrete recommendations:

- i. SCE aggregators who have underperformed should not have their contracts renewed.
- ii. Performance in 2014 should inform capacity payments in 2015 until subsequent AMP events are called next year.
- iii. The length of test events should reflect actual event lengths.
- iv. SCE's allowance of customer migration between AMP and Capacity Bidding Programs (CBP, also managed by aggregators) should not be allowed as it presents opportunities for gaming.

We address each of these concerns in order.

i.) SCE aggregators who have underperformed should not have their contracts renewed

¹² D.14-01-004, pp. 8-9.

¹³ If contractual changes were required in this resolution, SCE and the affected aggregators will have 13 days to complete the following: negotiate the changes, file an advice letter and obtain Commission approval of the advice letter. That is not feasible.

ORA notes that NAPP has 0 MWs of current AMP customers (as they have all migrated to CBP), has provided 0 MWs of DR in response to 2014 events, and is currently in bankruptcy proceedings. ECI also currently has 0 MWs of AMP customers, as they have all migrated to CBP. ECI has also provided 0 MWs of DR in response to the only 2014 event so far. Constellation also has 0 MWs of AMP customers as of August 29, 2014, with all of them having migrated to CBP. For these reasons, ORA recommends that the AMP contracts of NAPP, ECI, and Constellation not be extended for 2015 and 2016.

We have already rejected the proposed NAPP and Constellation contracts for reasons explained earlier in this resolution. We agree that the lack of nominated MWs at this time is an ominous sign for these contracts, but it does not necessarily mean no demand response will be provided from them in the bridge years. Performance and enrollment MWs by AMP contracts in 2015 and 2016 could improve. Further, the aggregators risk financial penalties if they underperform. As noted previously, AMP contract performance should be monitored and evaluated by SCE so that this information can be useful to the Commission in determining the extent to which similar contracts should be approved in the future.

ii.) Performance in 2014 should be used to inform capacity payments in 2015 until subsequent AMP events are called next year

ORA's main concern here appears to be that, under the current agreements, aggregators can collect capacity payments early in the demand response season without needing to prove commensurate customer performance via test event or actual dispatch¹⁴.

SCE responded that aggregators know that SCE can call a test event at any time, and thus if an aggregator were concerned that they could not meet their MW commitment in AMP then it would move its customers to the lower-risk Capacity Bidding Program (CBP) until they believe the portfolio could perform at a threshold to earn AMP payments¹⁵.

¹⁴ ORA (public) late-filed protest, p.6.

¹⁵ SCE reply to ORA late-filed Protest, September 26, 2014, p.4.

According to SCE, ORA's argument that the three contracts should be rejected because they have zero customer participants and would provide no ratepayer benefit, is flawed. SCE states that ORA is conflating forecasting accuracy with actual performance, and that simply because some aggregators' performance might be difficult to forecast is not sufficient reason to reject their contract.

We agree that the current mechanism for forecasting and testing nominated capacity in SCE's AMP agreements is less-than-perfect, but agree with SCE that this imperfection does not provide suitable grounds for rejection on its own. . As part of its monitoring and evaluation of AMP contract performance, SCE should also evaluate its methods of forecasting of MWs from the AMP program so that such improvements can be implemented if future contracts are authorized.

iii.) The length of test events should reflect the length of actual events

Overall, buyer- and seller-directed tests in 2013 tended to be only 1- or 2- hours in length (excepting an August 29, 2013 test, when SCE called a 4-hour test for all four aggregators). Actual dispatched events in 2013, however, were usually 4-hours long (excepting one 3-hour event for NAPP on August 30, 2013). On May 21, 2013, SCE directed tests of 1-hour each for EnerNOC and ECI. On August 29, 2013, SCE directed tests of 4-hours each for all four aggregators¹⁶.

ORA is concerned that short tests can mask the actual ability for a resource to deliver contracted MWs over the duration of a full event.

ORA made this recommendation in Phase 1 of R.13-09-011 which was focused on program improvements to existing demand response programs for the bridge years¹⁷. Specifically ORA recommended that test conditions should mimic actual dispatch conditions. However, the Commission chose not to order this specific recommendation in D.14-05-025, but instead encouraged SCE and its AMP

¹⁶ July 24, 2014, SCE Response to data request ORA-DR_SCE002 (2014), "Event Specifics".

¹⁷ R.13-09-011, ORA Opening Comments on Proposals for Revisions to DR Program Bridge Fund Years, pp.3-4.

contractors to consider ORA's recommendations.¹⁸ Because we declined to impose this specific condition on SCE to include in its AMP contracts, it would not be appropriate to do so via an advice letter process.

Further there could be benefit with a 1-hour test event minimum length for SCE contracts as that is different from the minimum event length for PG&E's AMP agreements. SCE should evaluate the differences between the two test event lengths to determine the extent to which it has a material effect upon program performance.

iv.) SCE's allowance of customer migration between AMP and Capacity Bidding Program (CBP) should not be allowed but requires further investigation

ORA states that aggregators may be gaming SCE's AMP and CBP programs by avoiding penalties in one program to gain payments in the other program, then returning back when the risk of penalties subsides¹⁹. However it was also unclear to ORA how aggregators could do this and still meet their AMP obligations and avoid penalties.

SCE states that it is theoretically possible that an aggregator could attempt to game the AMP contract by providing high performance in one month and then removing a substantial portion of its service accounts for the following month. SCE claims it can avoid these scenarios, though, by using simple common sense. This involves not making capacity payments to aggregators who have no AMP accounts enrolled in the months in question and actively testing aggregators who move substantial portions of their AMP portfolios into CBP to make sure the aggregator can still meet its contracted MW figure. SCE brings up specific examples where it took these actions²⁰.

We are not convinced by ORA's concerns that this issue requires an amendment to the proposed contracts. SCE provides concrete examples as to how potential

¹⁸ D.14-05-025, p. 40.

¹⁹ ORA late-filed Protest, 9/17/14, p.7.

²⁰ SCE Reply to ORA late-filed Protest, September 26, 2014, pp.2-3.

gaming can be appropriately mitigated. Nonetheless, this element of the program should be further examined in SCE's evaluation of the program.

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was neither waived or reduced. Accordingly, this draft resolution was mailed to parties for comments, and will be placed on the Commission's agenda no earlier than 30 days from today.

FINDINGS

1. Commission Decision D.14-05-025 directed Southern California Edison to file an Advice Letter to present its revised Aggregator Managed Portfolio contracts for bridge years 2015 and 2016 for approval.
2. SCE filed Advice Letter 3078-E in compliance with Commission Decision D.14-05-025.
3. ORA's protest was timely filed. ORA submitted a supplemental protest that was accepted by Energy Division as a late-filed protest.
4. It is appropriate for Energy Division to allow ORA's late-filed protest to be considered.
5. D.14-05-025 ordered SCE to continue to negotiate in good faith with its AMP contractors. SCE was also encouraged to consider improvements already made in PG&E's AMP agreements, which were approved by the Commission in D.14-02-033, and changes recommended by ORA in the proceeding.
6. SCE complied with the Commission's directives in D.14-05-025 for two of the four contracts that it proposes in AL 3078-E. The new EnerNOC and ECI contracts are compliant with the Commission's previous orders and should be approved.

7. The new Constellation and NAPP contracts are not compliant with the Commission's previous orders and should be rejected.
8. ORA's August 4, 2014 protest is rejected.
9. The Commission clearly stated that any changes to demand response programs proposed in R.13-09-011, including AMP contracts, should be implementable by January 1, 2015.
10. The Commission declines to implement ORA's specific recommendations from its September 17, 2014 late-filed Protest, but addresses them nonetheless as the concerns do raise important considerations for future demand response contracts.
11. SCE should monitor and evaluate the performance of its AMP program including the following elements: test event length, penalty structure and other terms that address non-performance, and customer switching between AMP and the Capacity Bidding Program. The information from its evaluation should be available in any future SCE's applications containing AMP agreements.

THEREFORE IT IS ORDERED THAT:

1. The request of Southern California Edison (SCE) to approve four demand response AMP contracts for 2015-16 as requested in Advice Letter 3078-E is partially approved. The proposed contracts for EnerNOC Inc. and Energy Connect, Inc. (ECI) are approved. The proposed contracts with Constellation Newenergy, Inc. (Constellation) and North America Power Partners (NAPP) are rejected.
2. SCE may enter into re-negotiations with Constellation and NAPP with the goal of designing AMP contracts that contain some elements of PG&E's AMP agreements and ORA's recommendations made in Phase 1 of R.13-09-011 as directed in D.14-05-025. Any revised AMP agreements with Constellation and NAPP that SCE chooses to renegotiate shall be filed within 30 days of this resolution in a Tier 2 advice letter.
3. SCE is directed to monitor and evaluate the performance of its AMP program including the following elements: test event length, penalty structure and other terms that address non-performance, and customer switching between AMP and the Capacity Bidding Program. SCE is directed to make this

information available in any future SCE's applications containing AMP agreements.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on December 18, 2014; the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

Confidential Appendix A

Energy Division Staff Analysis of SCE AMP Agreement Terms and Conditions

[Redacted]